U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13452640

DATE: JAN. 25, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for an Advanced Degree Professional

The Petitioner, an IT consulting company, seeks to employ the Beneficiary as a Microsoft practice manager. It requests classification of the Beneficiary as an advanced degree professional under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The petition was initially approved, but the Director of the Nebraska Service Center subsequently revoked the approval. In the revocation decision, however, the Director made no definitive determinations but instead stated that "it appears" the Petitioner and/or the Beneficiary failed to establish eligibility for the immigration benefit sought on two different grounds. On appeal the Petitioner submits a brief and additional documentation, asserts that the evidence of record does not support the Director's decision, and requests that the revocation decision be reversed.

Upon *de novo* review, we will withdraw the Director's decision and remand the case for further consideration and the issuance of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

Section 205 of the Act, 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority

is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a).

USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c). A notice of intent to revoke (NOIR) "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987).

II. PROCEDURAL HISTORY AND ANALYSIS

The instant petition was filed on October 26, 2017. It was accompanied by a labor certification which stated in section H, items 4, 9, 10, and 14, that the minimum educational and experience requirements for the job of Microsoft practice manager were a bachelor's degree with an emphasis in management information systems or computer science and five years of progressive post-baccalaureate experience including development work in Microsoft technologies.[1] The labor certification asserts that the Beneficiary met these requirements by virtue of a bachelor's degree in management information systems from the University [redacted] in 2007 and continuous employment with the Petitioner's predecessor companies and the Petitioner from 2007 to 2017 that featured a series of job titles including associate consultant with [redacted] (June 2007 to March 2008), consultant with [redacted] (March 2008 to September 2011), senior consultant with [redacted] (September 2011 to August 2013), senior consultant with the Petitioner (August 2013 to October 2014), and Microsoft practice custom development manager with the Petitioner (November 2014 to the summer of 2017, when the labor certification was filed).[2] As evidence of the Beneficiary's qualifications the Petitioner submitted copies of the Beneficiary's academic record and diploma from the University [redacted] showing that the Beneficiary was awarded a bachelor of business administration with a major in management information systems on June 1, 2007, and a letter from the Petitioner's controller detailing the Beneficiary's employment history as presented in the labor certification. The petition was approved on November 6, 2017.

On December 16, 2019, however, the Director issued a notice of intent to revoke (NOIR) the petition's approval. The Director referred to USCIS records indicating that during an immigrant visa interview the Beneficiary stated that he saw the proffered position mentioned on a job posting board in mid-2016, applied for the job, and was accepted by the end of 2016, all of which occurred before the proffered position was advertised from March to May 2017 as a preliminary to filing the labor certification application underlying this petition. The Director stated that it appeared the job opportunity was not clearly open to any U.S. workers and that the position was created specifically for

[1] The date the labor certification application was filed with the DOL, June 29, 2017, is the priority date of the petition. *See* 8 C.F.R. § 204.5(d). All requirements for the proffered position, as stated in the labor certification, must be met by the priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg' Comm'r 1977).

[2] Since the labor certification indicates at section J.21 that the Beneficiary did not gain any qualifying experience with the employer (Petitioner) in a position substantially comparable to the job opportunity in this proceeding, the Beneficiary's experience with the Petitioner from August 2013 to the summer of 2017 is not qualifying experience. See also 20 C.F.R. § 656.17(i)(5)(i) and (ii).

the Beneficiary.[3] The Director also listed the dates and job titles the Beneficiary had held with the Petitioner since June 2007, as described in the employment verification letter that accompanied the petition, and stated that USCIS records indicated the Beneficiary had worked under different job titles. The Director listed a series of documents from the Petitioner between 2011 and 2016 (four letters and a previous ETA Form 9089) which identified the Beneficiary as a programmer analyst since 2007, as well as a 2013 tax return of the Beneficiary that indicated he worked as a software programmer. The Director noted that the job titles identified in these USCIS records differed from the job titles identified in the current labor certification and the employment verification letter submitted with the instant petition. The Director stated that the Beneficiary's experience appeared to have been inflated to qualify for the proffered position. The Petitioner was advised of the Director's intent to revoke the petition's approval, and granted 30 days to respond to the NOIR.

In response to the NOIR the Petitioner first addressed the issue of whether the proffered position was a *bona fide* job opportunity open to U.S. workers. The Petitioner acknowledged its desire to hire the Beneficiary before initiating its recruitment in the labor certification process, but asserted that it fully complied with the regulatory requirements, conducted a comprehensive recruitment for the proffered position, and did not find any U.S. worker willing, able, and qualified for the job. The Petitioner submitted copies of all its job advertisements and related activities during the recruitment process.

Next the Petitioner addressed the issue of whether the Petitioner inflated the Beneficiary's experience to qualify him for the proffered position. The Petitioner stated that the Beneficiary's reference to himself as a "software programmer" on his 2013 tax return accurately identified his "occupation" as the tax form required, whereas his specific job title of senior consultant would not have indicated the actual nature of his job. The Petitioner also indicated that its use of the job title programmer analyst in prior correspondence related to the earlier H-1B (nonimmigrant) and I-140 (immigrant) petitions it filed on behalf of the Beneficiary more accurately described what the Beneficiary did in those jobs but did not conflict its use of the job title "consultant" in the instant proceeding. The nature of the Beneficiary's experience, the Petitioner claimed, should be determined by the duties performed, not the job title. Finally, the Petitioner claimed that the jobs held by the Beneficiary from 2007 onward represented "progressive" experience because, while the duties were similar, they involved increased responsibility and complexity.

After receiving the Petitioner's response to the NOIR, the Director revoked the petition's approval. Focusing on the different job titles past and present, the Director stated that all of the Petitioner's prior H-1B petitions on behalf of the Beneficiary were for the position of "programmer analyst" and indicated that this "evidence about the [B]eneficiary's employment . . . contradicts the information asserted on the new ETA Form 9089." The Director went on to state that the discrepancies indicated the Beneficiary's experience was not "progressively responsible" as required to qualify for the proffered position. The Director wrapped up his analysis by stating the following:

[3] Because of the design of the labor certification process, every petitioner who files a labor certification has already identified a foreign national that they wish to hire prior to the required recruitment. The Petitioner's identification of the Beneficiary prior to the required recruitment, or even its employment of the Beneficiary in the offered job, does not indicate that the job is not open to U.S. workers. Rather, it indicates that the Petitioner followed DOL regulations in accord with the Program Electronic Review Management (PERM) protocol after identifying a foreign national for the position. *See, e.g.*, 20 C.F.R. § 656.17.

> It appears that the evidence does not establish that the beneficiary gains [*sic*] five years of progressively [*sic*] experience in the job offered. It also appears that both the petitioner and the beneficiary misrepresented material facts when they signed the Form ETA 9089 declaring the information about the employment was true and correct.

These two sentences, however, do not include any definitive findings of fact or conclusions of law. Therefore, they do not constitute valid grounds for revoking the approval of the petition.

The Director states that "it appears" the Beneficiary did not gain five years of progressive experience, but does not explain why. The Director discusses the discrepancies between the job titles used in earlier petitions and the current petition, but does not discuss the job duties as described in the labor certification and the employment verification letter supporting this petition, whether they are consistent with each other,[4] and whether they varied significantly from the job duties as described in the earlier petitions. The duties performed, not the titles of the jobs, are the crucial factor in determining the nature of the Beneficiary's prior positions and whether he gained "progressive" experience over the years. In the absence of a proper analysis or a definitive determination by the Director, we will not substitute our own decision on this issue.

The Director also states that "it appears" both the Petitioner and the Beneficiary "misrepresented material facts" in the labor certification when they affixed their signatures to that document. However, the Director does not identify the specific facts that were allegedly misrepresented. While we may surmise that the Director is referring to the Beneficiary's job titles and experience as claimed in the labor certification, the Director did not even discuss the job duties described therein much less explain how their presentation in the labor certification misrepresented material facts.

Furthermore, the Director neither identified "misrepresentation of material facts" in the NOIR as a "good and sufficient cause" to revoke the petition's approval, as required in *Matter of Estime*, nor properly analyzed in the revocation decision whether the Petitioner and/or the Beneficiary actually misrepresented material facts. A misrepresentation is an assertion or manifestation that is not in accord with the true facts. For an immigration officer to find a willful and material misrepresentation of fact, he or she must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui,* 15 I&N Dec. 288, 289 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." *Matter of Ng,* 17 I&N Dec. 536, 537 (BIA 1980).

Thus, even if "it appear[ed]" to the Director that the Petitioner and the Beneficiary willfully misrepresented material facts in the labor certification, the lack of any reference thereto in the NOIR

[4] It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

and the lack of proper analysis in the revocation decision in accord with the case law discussed above precludes us from making a finding that even the Director did not make.

III. CONCLUSION

For the reasons discussed above, we will withdraw the Director's decision in its entirety and remand the case for further consideration. The Director may issue a new NOIR and, following the Petitioner's response thereto or the expiration of the time period for response, issue a new decision.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.